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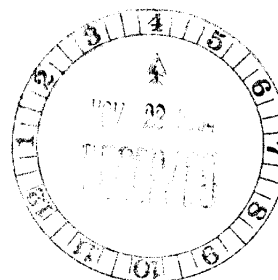
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November 23, 2004

***By Hand Delivery***

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001



**Re: STB Docket No. 42072, Carolina Power & Light Company v. Norfolk Southern Railway Company**

Dear Secretary Williams:

Enclosed for filing on behalf of Norfolk Southern Railway Company ("NS") in the above-referenced proceeding are a signed original and ten (10) copies of the Reply Of Norfolk Southern Railway Company To The Response Of Carolina Power & Light Company To The Board's October 20, 2004 Order ("Reply"). Additionally, this filing includes a floppy disk containing an electronic version of the Reply.

Please acknowledge receipt of this submission for filing by date-stamping the enclosed duplicate paper copy and returning it to our messenger.

If you have any questions concerning this filing, please contact one of the undersigned. Thank you for your attention to this matter.

Sincerely,

G. Paul Moates

Terence M. Hynes

Paul A. Hemmersbaugh

Enclosures

cc: Counsel for Complainant (w/encls.)

BEFORE THE  
SURFACE TRANSPORTATION BOARD

CAROLINA POWER & LIGHT COMPANY,

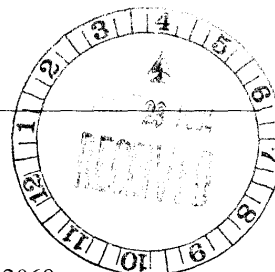
Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

Docket No. 42069



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REPLY OF NORFOLK SOUTHERN RAILWAY COMPANY TO THE  
RESPONSE OF CP&L ENERGY CORPORATION TO THE BOARD'S  
OCTOBER 20, 2004 ORDER

**NORFOLK SOUTHERN RAILWAY COMPANY**

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Attorneys for Defendant.

**DATED: November 23, 2004**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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CAROLINA POWER & LIGHT COMPANY )

Complainant, )

v. )

NORFOLK SOUTHERN RAILWAY COMPANY )

Defendant. )

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Docket No. 42072

**REPLY OF NORFOLK SOUTHERN RAILWAY COMPANY TO THE  
RESPONSE OF CAROLINA POWER & LIGHT COMPANY TO THE BOARD'S  
OCTOBER 20, 2004 ORDER**

Norfolk Southern Railway Company ("NS"), Defendant in the above-captioned maximum reasonable rate proceeding, hereby submits its Reply to the "Response of Carolina Power & Light Company to the Board's October 20, 2004 Order", filed on November 19, 2004 (hereinafter the "CP&L Response"). NS is filing this Reply in much less than the 20 days which the Board's rules allow to permit an expeditious resolution of the limited, albeit very important, area of disagreement between it and Carolina Power & Light Company ("CP&L") on the proposed schedule for phasing proceedings.

CP&L correctly states that the parties have been able to reach "essential agreement in regard to the timeline" (CP&L Response at 4) for the various matters that will need to be addressed in connection with proceedings directed at determining whether the phasing constraint of the Constrained Market Pricing ("CMP") Guidelines may be applied in this case, and, if so, in what manner phasing could or should be ordered by the Board. That agreement includes the important point that the three Eastern coal rate cases -- i.e., the instant case plus Duke Energy Corporation v. CSX Transportation, Inc., Docket No. 42070, and Duke Energy Corp v. NS

Railway Co., Docket No. 42069 -- are separate proceedings, each of which should be handled on its own schedule. However, the parties have a serious disagreement about the fair and appropriate procedure for the submission of evidence addressed to the phasing constraint and the standards that the Board will adopt for making its determination.

NS proposes that the parties file simultaneous Opening and Reply Statements of Fact and Argument (which should include argument on relevant issues of law) on the same dates that CP&L proposes for the first two rounds of the three-rounds of submissions that it seeks -- that is, NS proposes that the parties make simultaneous opening filings on the 120<sup>th</sup> day following issuance of a Board Decision setting the schedule for this proceeding (referred to by both parties as "D+120") and simultaneous reply filings on D+150. CP&L by contrast seeks the opportunity to make two filings -- an opening and a rebuttal -- but would allow NS only a single "reply" filing.

CP&L argues that it should be permitted to open and close because it bears the burden of proof on the phasing constraint. Although NS agrees that CP&L should properly bear the burden of proof in any phasing proceeding, it does not agree that burden justifies allowing CP&L to file two rounds of evidence while limiting NS to a single round. CP&L contends that the procedure "followed in the earlier phase of this case followed this pattern." (CP&L Response at 4). However, in a more analogous portion of this proceeding -- the Board's order directing the parties to submit additional evidence concerning the costs and revenues of re-routed traffic -- the Board directed the parties to file two rounds of evidence with each party filing simultaneously in each round. *See Decision, Duke Energy Corp. v. CSXT and Carolina Power & Light v. NS, STB Doc. Nos. 42070, 42072* (served Oct. 14, 2003). This approach, which worked well for those previous supplemental submissions, is exactly what NS proposes for evidence and argument

concerning the phasing constraint. As the Board found when it ordered the parties to submit supplemental evidence last Fall, allowing two rounds of evidence on a reasonable schedule should also facilitate accomplishment of the Board's goal of expeditious consideration and resolution of relevant issues (here, phasing). *See id*

Further, in the primary evidentiary phase of this proceeding, each party was permitted to make a submission in each of the three rounds of evidence and argument that the Board ordered for compilation of the extensive record on stand-alone and variable costs. In other words, both NS and CP&L filed Opening, Reply, and Rebuttal Evidence and Argument because each had different issues that it addressed in each phase. In each of the three rounds of SAC evidence, each party made a significant filing that dealt with not only the issues of stand-alone and variable costs, but also with other important matters (such as NS' justification for raising CP&L's rates by the amount of the challenged increases and CP&L's attacks on the percentage reduction methodology) that helped develop a complete record for the Board's consideration.

Moreover, because of the paucity of precedent, it is clear that a central focus of phasing proceedings will necessarily be the determination of what legal standards the Board will apply in its evaluation of CP&L's post-*Decision* request for phasing. For example, at this time NS anticipates that it will argue that: (1) phasing is not available to a shipper that fails to invoke the remedy in its complaint or at any time prior to the Board's issuance of a Decision on the merits of the shipper's challenge, or which otherwise waives its right to seek such a remedy; and (2) unless and until the complainant first proves with specificity that the challenged rail rates (which the Board has found to be reasonable) will cause "significant economic dislocation," the Board may not consider the factors mentioned in the Coal Rate Guidelines in connection with phasing (*i.e.* complainant must make a threshold showing – as a condition precedent to the Board's


consideration of other factors or balancing of the equities – that implementing the full reasonable rates immediately will cause significant economic dislocation). *See Coal Rate Guidelines*, 1 I.C.C.2d 520, 546-47. These are legal questions, not questions of fact. Neither side has the burden of proof on such questions of law, and the Board would benefit from both parties' contemporaneous exposition of the applicable legal standards and their responses to the standards proposed by the other party.

Disagreement concerning the governing legal standards is more than a theoretical possibility. It is apparent from discussions between counsel regarding the likely scope of discovery that there are significant areas of disagreement between the parties about the appropriate standard for determining whether phasing should be ordered in this case. That disagreement will require the Board to address important issues that have not been presented to it previously. NS respectfully submits that the Board will best be aided in its analytical efforts by the development of a record based upon the parties clearly engaging and joining issue on those important matters through simultaneous filings at the outset of the proceedings.

NS' proposed schedule and procedure are appended in Exhibit 1. NS respectfully requests that the Board order their adoption.

Respectfully submitted,

NORFOLK SOUTHERN RAILWAY COMPANY



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Attorneys for Defendant

**Dated: November 23, 2004**

**Exhibit 1**

D <sup>1</sup> + 25	Discovery served.
D + 55	Responses and objections to discovery requests due.
D + 60	STB Discovery Conference. <sup>2</sup>
D + 90	Completion of Production.
D + 120	Simultaneous Filings of Opening Statements of Fact and Argument.
D + 150	Simultaneous Filings of Reply Statements of Fact and Argument.
D + 180	Parties file Briefs.

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<sup>1</sup> “D” represents the service date of the decision in which the Board adopts a procedural schedule for this case. The Parties will confer after the STB issues the decision establishing “D” and will agree on dates certain for all events, avoiding weekends and holidays.

<sup>2</sup> If significant discovery issues are not resolved, a delay in the proposed schedule may be necessary to accommodate motions to compel and additional discovery conferences. The parties have agreed, however, to try to avoid such conflicts.



**CERTIFICATE OF SERVICE**

I hereby certify that on November 23, 2004, the foregoing Reply of Norfolk Southern Railway Company to the Response of CP&L Energy Corporation to the Board's October 20, 2004 Order was served by hand upon the following:

C. Michael Loftus  
Robert D. Rosenberg  
Andrew B. Kolesar III  
Kendra A. Ericson  
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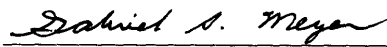
Attorneys for Complainant

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 23rd day of November, 2004, the foregoing Reply Of  
Norfolk Southern Railway Company To The Response Of Carolina Power & Light Company To  
The Board's October 20, 2004 Order was served by hand upon:

C. Michael Loftus  
Christopher A. Mills  
Frank J. Pergolizzi  
Peter A. Pfohl  
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Attorneys for Complainant

  
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Gabriel S. Meyer